

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

CEDRIC HART et al.,

Defendants and Appellants.

C057652

(Super. Ct. No.
05-7051)

APPEAL from a judgment of the Superior Court of Yolo County, David Rosenberg, Judge. Reversed in part and affirmed in part.

Marcia R. Clark for Defendant and Appellant Cedric Hart.

Robert Navarro, under appointment by the Court of Appeal, for Defendant and Appellant Tyrone Rayford.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, David A. Rhodes and Michael Dolida, Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rule 8.110, this opinion is certified for publication with the exception of parts II through V.

Defendants Cedric Hart and Tyrone Rayford entered a liquor store intending to rob the husband and wife working there. Hart exhibited a gun and demanded money. When Hart saw a gun in an open drawer below the cash register, he fired on the husband, hitting him in the abdomen.

Convicted of attempted robbery, attempted murder, and assault with a firearm, the defendants appeal. They make contentions of error relating to the sufficiency of the evidence, the jury instructions, and sentencing.

In the published portion of this opinion, we focus on the trial court's instructions with respect to the natural and probable consequences doctrine. Under the instructions as given, the jury may have convicted Rayford of attempted *premeditated* murder as an aider and abettor under the natural and probable consequences doctrine. The instructions on natural and probable consequences, however, referred to "attempted murder" without noting that, in order to convict Rayford of attempted *premeditated* murder under the natural and probable consequences doctrine, the jury would have to find that attempted *premeditated* murder was a natural and probable consequence of the attempted robbery. We therefore conclude that Rayford's conviction for attempted premeditated murder must be reversed and remanded.

In the unpublished portion of this opinion, we conclude that the defendants' remaining contentions are without merit.

FACTS

On a November evening, Zakkiyyah Spikes, who was defendant Cedric Hart's girlfriend, drove Hart and defendant Tyrone Rayford from south Sacramento to West Sacramento in her Buick. She got off the freeway in West Sacramento, and Hart took over driving. Hart stopped the Buick on a residential street, and he and Rayford got out but left the engine running. Spikes stayed in the car.

Hart and Rayford went into the Poplar Food and Liquor Store where Parvinder Singh and Rupindir Kaur (also known as Rimpi Parher), husband and wife, were working. Hart and Rayford entered the store and raised Singh's suspicions by the way they were acting, looking out the window.

When the only other customer in the store left, Hart and Rayford approached the counter. Singh was behind the counter, at one of the cash registers. Hart and Rayford paid for some items, and Singh gave them change. Hart asked for a plastic bag, and Singh gave him one. After Singh gave Hart the bag, Hart opened his coat, revealing a gun and pointing it at Singh, and told Singh to put all the money in the bag.

Rayford moved behind the counter, and Hart moved to the edge of the counter. Singh opened a drawer under the cash register, where money was kept. There was also a gun in the drawer. As Singh put his hand on the money in the drawer, Hart saw the gun and shot at Singh. Hart rapidly fired the gun three times, hitting Singh in the abdomen once. Hart and Rayford

moved away from Singh, Hart walking backwards toward the door, and Singh grabbed the gun and shot back. Singh shot Hart in the chest. During the exchange, Kaur was hit in the left hand and Rayford in the left foot.

Hart and Rayford rejoined Spikes in the Buick, and Spikes drove away. Officers of the West Sacramento Police Department soon gave chase but did not detain the three occupants until they had driven to Methodist Hospital in south Sacramento.

The two victims survived and testified at trial.

Additional evidence is summarized as it becomes relevant to the discussion.

PROCEDURE

The district attorney charged Hart and Rayford by information with two counts of attempted second degree robbery (Pen. Code, §§ 21a, 211, 212.5, subd. (c) -- counts 1 and 2); two counts of attempted murder (Pen. Code, §§ 21a, 187, subd. (a) -- counts 3 and 4); and two counts of assault with a firearm (Pen. Code, § 245, subd. (a)(2) -- counts 5 and 6). As to the attempted robbery and attempted murder counts, the district attorney alleged that Hart personally discharged a firearm causing great bodily injury (Pen. Code, § 12022.53, subd. (d)) and that Rayford participated in a crime in which a principal was armed (Pen. Code, § 12022, subd. (a)(1)). As to the attempted murder counts, the district attorney alleged the attempted murders were willful, deliberate, and premeditated (Pen. Code, § 189). As to the assault with a firearm charged in count 5, the district attorney alleged that Hart personally used

a firearm (Pen. Code, § 12022.5, subd. (a)) and personally inflicted great bodily injury (Pen. Code, § 12022.7, subd. (a)). As to the assault with a firearm charged in count 6, the district attorney alleged that Hart personally used a firearm (Pen. Code, § 12022.5, subd. (a)).

A jury found Rayford not guilty on count 4 (attempted murder of Rupindir Kaur), and could not reach of verdict concerning Hart on the same count. The jury convicted Hart and Rayford on all other counts and found all allegations associated with those counts true.

Count 4 against Hart was dismissed on the district attorney's motion.

The trial court sentenced Hart to an indeterminate term of life with possibility of parole on count 3 (attempted murder) and consecutive indeterminate terms of 25 years to life for the Penal Code section 12022.53, subdivision (d) enhancements (personally discharging a firearm causing great bodily injury) on counts 1 and 2. The court imposed consecutive determinate terms for counts 1 and 2 (attempted robbery) -- the upper term of three years for count 1 and eight months (one-third of the middle term) for count 2. The court imposed and stayed terms on counts 5 and 6 (with enhancements) and on the Penal Code section 12022.53, subdivision (d) enhancement associated with count 3. The aggregate sentence imposed on Hart is a determinate term of three years eight months, plus an indeterminate term of 50 years to life, plus an indeterminate term of life with possibility of parole.

The trial court sentenced Rayford to an indeterminate term of life with possibility of parole on count 3 (attempted murder). The court imposed consecutive determinate terms on counts 1 and 2 (attempted robbery) -- the middle term of two years for count 1 and eight months (one-third the middle term) for count 2. The court also imposed a one-year firearm enhancement on count 1 under Penal Code section 12022, subdivision (a)(1). The court imposed and stayed terms on counts 5 and 6 and on the firearm enhancements associated with counts 2 and 3. The aggregate sentence imposed on Rayford is a determinate term of three years eight months, plus an indeterminate term of life with possibility of parole.

DISCUSSION

I

Natural and Probable Consequences Instruction

One of the prosecution's theories of guilt as to Rayford was that he aided and abetted Hart in the attempted robbery of Singh and that the attempted murder of Singh was a natural and probable consequence of the attempted robbery. Convicted of attempted murder of Singh with premeditation and deliberation, Rayford contends that the trial court did not sufficiently instruct the jury concerning the relationship between the natural and probable consequences doctrine and the premeditation and deliberation element of attempted premeditated murder. We agree. And we further determine that the error was prejudicial.

A. *The Natural and Probable Consequences Doctrine*

"At common law, a person encouraging or facilitating the commission of a crime could be held criminally liable not only for that crime, but for any other offense that was a 'natural and probable consequence' of the crime aided and abetted.

[Citations.] [¶] Although the 'natural and probable consequences' doctrine has been 'subjected to substantial criticism' [citation], it is an 'established rule' of American jurisprudence [citation]. It is based on the recognition that 'aiders and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put in motion.' [Citation.]" (*People v. Prettyman* (1996) 14 Cal.4th 248, 260 (*Prettyman*).)

"The determination whether a particular criminal act was a natural and probable consequence of another criminal act aided and abetted by a defendant requires application of an objective rather than subjective test. [Citations.] This does not mean that the issue is to be considered in the abstract as a question of law. [Citation.] Rather, the issue is a factual question to be resolved by the jury in light of all of the circumstances surrounding the incident. [Citations.] Consequently, the issue does not turn on the defendant's subjective state of mind, but depends upon whether, under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the

defendant. [Citations.]” (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.)

B. *Instructions on Natural and Probable Consequences*

The trial court instructed the jury concerning the natural and probable consequences doctrine. It used CALCRIM No. 402 and inserted “attempted robbery” for the target crime and “attempted murder or assault with a firearm” for the nontarget crime. This instruction on the natural and probable consequences doctrine did not mention the premeditation element of attempted premeditated murder as charged and prosecuted in this case.

The instruction stated:

“The defendants are charged in Counts 1 and 2 with attempted second [degree] robbery, and in Counts 3 and 4 with attempted murder, and in Counts 5 and 6 with assault with a firearm.

“Under certain circumstances, natural and probable consequences doctrine of aiding and abetting, a person who is guilty of one crime may also be guilty of other crimes that were committed at the same time.

“Under this doctrine, to prove that the defendant is guilty of the attempted murder or assault with a firearm, the People must prove that:

“

“One, the defendant is guilty of attempted robbery.

“Two, during the commission of the attempted robbery the crime of attempted murder or assault with a firearm was committed.

"And three, under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the attempted murder or assault with a firearm was a natural and probable consequence of the commission of the attempted robbery.

"A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes.

"In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the attempted murder or assault with a firearm was committed for a reason independent of the common plan to commit the attempted robbery, then the commission of the attempted murder or assault with a firearm was not a natural and probable consequence of attempted robbery.

"To decide whether the crimes of attempted murder and assault with a firearm were committed, please refer to the separate instructions that I have given you for those crimes."

The court also instructed the jury concerning the elements of attempted murder and how it may be proved. And it instructed the jury that, if the jury found the defendant guilty of attempted murder, it must "decide whether the People have proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation."

The court did not relate the instruction concerning premeditation and deliberation to the natural and probable consequences instruction. In other words, the court did not

instruct the jury that, in order to find Rayford guilty of attempted *premeditated* murder as an aider and abettor under the natural and probable consequences doctrine, the jury would have to find that attempted *premeditated* murder is a natural and probable consequence of the attempted robbery. With respect to the natural and probable consequences doctrine, the jury was asked only whether "under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the attempted murder or assault with a firearm was a natural and probable consequence of the commission of the attempted robbery."¹

C. *Application of Natural and Probable Consequences to Attempted Premeditated Murder*

We must determine whether the instructions given were sufficient to inform the jury of its duty with regard to the premeditation and deliberation element of attempted premeditated murder as it relates to the natural and probable consequences doctrine. We conclude that (1) the jury, under the facts of this case, could have concluded that attempted unpremeditated murder was a natural and probable consequence of the attempted

¹ At trial, Rayford proposed an additional instruction that the jury could find that the natural and probable consequence of the attempted robbery could be a lesser included offense of attempted murder, such as attempted voluntary manslaughter. The trial court declined to give this instruction. On appeal, Rayford states that the trial court properly refused to instruct the jury that attempted voluntary manslaughter is a lesser included offense of attempted murder under the circumstances of this case.

robbery and that attempted premeditated murder was not a natural and probable consequence and (2) the instructions were insufficient to inform the jury concerning its duty in this regard.

1. Attempted Unpremeditated Murder

The natural and probable consequences doctrine allows a jury to convict an aider and abettor of any nontarget crime committed by the actual perpetrator if it was the natural and probable consequence of the target crime that the aider and abettor intended to aid and abet. In *People v. Woods* (1992) 8 Cal.App.4th 1570 (*Woods*), we held that the aider and abettor may also be convicted of a nontarget crime lesser than the nontarget crime committed by the actual perpetrator. The Supreme Court cited and discussed the holding of *Woods* approvingly in *Prettyman, supra*, 14 Cal.4th at pages 275 and 276. The *Prettyman* court stated:

"In *Woods*, the defendant and a companion went in search of a rival gang member. They entered the apartment of two acquaintances of the member of the rival gang, and assaulted the occupants. As they were leaving, they saw two people getting into a car. The defendant's companion fired into the car, killing one occupant and injuring the other. At trial, the prosecution's theory was that the defendant was criminally responsible for the shootings committed by his companion, contending that the shootings were a natural and probable consequence of the crimes committed in the apartment that the defendant had aided and abetted. During deliberations, the jury

asked, 'Can a defendant be found guilty of aiding and abetting a murder in the second degree if the actual perpetrator of the same murder is determined to be guilty of murder in the first degree?' The trial court answered, 'No.' The Court of Appeal held that this answer was prejudicial error. [Citation.]

"The *Woods* court reasoned that when the prosecution contends that the defendant is guilty as an accomplice under the 'natural and probable consequences' doctrine, the defendant 'does not stand in the same position as the perpetrator'; hence, 'the aider and abettor and the perpetrator may have differing degrees of guilt based on the same conduct depending on which of the perpetrator's criminal acts were reasonably foreseeable under the circumstances and which were not.' [Citation.]

"*Woods* also addressed the question whether the trial court should have instructed the jury on the lesser included offenses of voluntary and involuntary manslaughter. Although the court concluded that under the facts of that case such instructions were unnecessary, it held that in some cases such instructions would be necessary at the trial of an aider and abettor even if the evidence did not show that the actual perpetrator was guilty only of the lesser included offense. As the court explained: 'If the evidence raises a question whether the offense charged against the aider and abettor is a reasonably foreseeable consequence of the criminal act originally aided and abetted but would support a finding that a necessarily included offense committed by the perpetrator was such a consequence, the trial court has a duty to instruct sua sponte on the necessarily

included offense as part of the jury instructions on aider and abettor liability.' [Citation.]" (*Prettyman, supra*, 14 Cal.4th at pp. 275-276, italics omitted.)

In *Woods*, we concluded that the trial court should have instructed the jury that it could find the aider and abettor guilty of the nontarget crime of second degree murder even though the actual perpetrator was guilty of first degree murder. Here, we must decide whether that holding also requires the court to inform the jury that it can convict an aider and abettor of attempted unpremeditated murder even though the actual perpetrator is convicted of attempted premeditated murder. We conclude that *Woods* requires such an instruction.

Based on the facts of this case, a reasonable jury could have concluded that the actual perpetrator (Hart) was guilty of attempted premeditated murder but that the aider and abettor (Rayford) was guilty of no more than attempted unpremeditated murder.² It is beyond dispute that Hart and Rayford planned to rob the victims. Hart had a gun and used it, and it is reasonable to infer that Rayford knew that Hart had a gun and intended to use it if necessary. However, it would also be reasonable on these facts to conclude that a reasonable person in Rayford's position may not have concluded that attempted

² In the unpublished portion of this opinion, we find that there was sufficient evidence that both Hart and Rayford committed attempted premeditated murder. Therefore, Rayford may be retried on that charge, if the People elect to do so. (*People v. Edwards* (1985) 39 Cal.3d 107, 118 [People entitled to retry after reversal for instructional error].)

premeditated murder would be a natural and probable result of the planned robbery. In other words, it was theoretically possible for the jury to conclude that Hart premeditated the attempted murder but that such premeditation was not a natural and probable consequence of the attempted robbery. That was a factual question for the jury. Although the facts in the record are sufficient to support a jury finding that attempted premeditated murder was a natural and probable consequence of the attempted robbery, the facts do not lead ineluctably to that conclusion.

2. Sufficiency of Instructions

Having determined that the jury could have found, on the facts presented at trial, that attempted unpremeditated murder, and not attempted premeditated murder, was a natural and probable consequence of the attempted robbery, we must decide whether the instructions, as given, properly prepared the jury to determine the extent of Rayford's culpability for the attempted murder. We conclude that the instructions were inadequate.

Attempted premeditated murder is the functional equivalent of a greater offense than attempted unpremeditated murder. (*People v. Izaguirre* (2007) 42 Cal.4th 126, 132.) The instruction properly defined attempted murder and the additional element of premeditation and deliberation. However, with respect to the natural and probable consequences doctrine, the instruction given to the jury by the trial court addressed attempted murder and assault with a firearm without mentioning

the premeditation and deliberation element of attempted premeditated murder.

The Attorney General asserts that attempted murder is not divided into degrees. Therefore, it was unnecessary to relate the premeditation and deliberation element to the natural and probable consequences doctrine because premeditation and deliberation were merely an element of attempted murder. This argument avoids, rather than answers, the question of how the jury is to know its duty with regard to the premeditation and deliberation element. The logic of *Woods* is not based on the separation of murder into degrees. It is based on the possibility that the jury could conclude that the aider and abettor was not necessarily guilty of all of the elements of the greater crime committed by the actual perpetrator. (*Woods*, *supra*, 8 Cal.App.4th at p. 1593.) Therefore, it is necessary to instruct the jury that it may find less culpability in the aider and abettor under the natural and probable consequences doctrine.

The instructions did not fully inform the jury that, in order to find Rayford guilty of attempted premeditated murder as a natural and probable consequence of attempted robbery, it was necessary to find that attempted premeditated murder, not just attempted murder, was a natural and probable consequence of the attempted robbery.

The trial court's general instructions concerning the premeditation and deliberation element of attempted premeditated murder did not suffice. The trial court properly instructed the

jury concerning premeditation and deliberation, as it relates to attempted murder, stating, in essence, that it is a subjective state of mind. However, in determining whether the premeditation and deliberation element was a natural and probable consequence of the attempted murder, the jury does not look at the aider and abettor's subjective state of mind. Therefore, the general instruction concerning the premeditation and deliberation element of attempted murder did not properly inform the jury concerning its duty with respect to the natural and probable consequences doctrine.

We conclude that the trial court has a duty, sua sponte, to instruct the jury in a case such as this one that it must determine whether premeditation and deliberation, as it relates to attempted murder, was a natural and probable consequence of the target crime. Having failed to do so here, the trial court erred.

D. *Prejudice Analysis*

Error in instructing the jury concerning lesser forms of culpability is reversible unless it can be shown that the jury properly resolved the question under the instructions, as given. (*People v. Chatman* (2006) 38 Cal.4th 344, 392.) We conclude that the error was prejudicial and requires reversal.

Again, *Woods* is instructive in this regard. We said: "In effect, the jury was given an unwarranted all-or-nothing choice with respect to aider and abettor liability for the killing Faced with evidence from which it could conclude that only second degree murder was a reasonably

foreseeable consequence of Windham's aiding and abetting Woods in assaulting Allen and Johnson, but having no option to convict Windham of second degree murder, the jury may have been reluctant to acquit him of the greater offense of first degree murder. Stated another way, the jury may have returned a verdict of guilt on first degree murder to avoid the absurd result of absolving Windham of any responsibility for a killing which was a reasonably foreseeable consequence of his act of aiding and abetting the violent assaults on Allen and Johnson. This illustrates why the jury should have been told it could find a defendant guilty of second degree murder as an aider and abettor even if it determined the perpetrator was guilty of first degree murder." (*Woods, supra*, 8 Cal.App.4th at p. 1590.)

Here, the problem is a bit different from the problem in *Woods*. In that case, the court told the jury that it could not convict the aider and abettor of a lesser crime. In our case, the court was not so explicit. Instead, it merely failed to inform the jury that it could convict Rayford of a lesser crime than Hart's crime under the natural and probable consequences doctrine. The result, however, is the same. The jury was left to its own devices without proper guidance concerning the law. Under the instructions given, the jury may have found Rayford guilty of attempted murder using the natural and probable consequences doctrine, an objective test, and then found the premeditation and deliberation element true using the only instruction given as to that element, which described a subjective test. Thus, the instructions on the natural and

probable consequence doctrine and attempted murder were prejudicially deficient.

Rayford's attempted premeditated murder conviction must be reversed and remanded to the trial court for retrial. The jury determined that Rayford committed attempted murder under instructions that were proper to that extent. Thus, the only remaining question is whether he is further guilty under the premeditation and deliberation element. (*Woods, supra*, 8 Cal.App.4th at p. 1596.)

II

Sufficiency of Arming Evidence (Hart)

Hart contends that the evidence was insufficient to support the jury's conclusion that he personally used a firearm. He bases this contention, mainly, on the conflicting eyewitness accounts of the victims. Therefore, argues Hart, the arming enhancements, including the two enhancements pursuant to Penal Code section 12022.53, subdivision (d), which resulted in terms of 25 years to life, must be reversed. We disagree. Viewing the evidence properly, it was sufficient to support the jury's findings.

A. Evidence Concerning Identification

The victims' identifications of the defendants were inconsistent. At different times, each victim failed to identify Hart as the gunman. However, at trial, Singh identified Hart as the gunman. Additionally, Hart had gunshot residue on his hand, but Rayford had none.

When Singh's wife, Kaur, was presented with a photographic lineup, she failed to pick either of the defendants from that lineup, although she chose three others whom she thought may have been perpetrators. At the preliminary hearing, Kaur identified Hart as the gunman and Rayford as the other perpetrator. But at trial, Kaur identified Rayford as the gunman and Hart as the other perpetrator.

Singh was more consistent, though not totally, in identifying Hart as the gunman. When shown the photographic lineup, Singh identified Rayford as the gunman and did not identify Hart. He identified someone else as the unarmed perpetrator. At the preliminary hearing and again at trial, Singh identified Hart as the gunman and Rayford as the other perpetrator. However, also at trial, it appears that Singh may have mistakenly picked from the photographic lineup cards a person other than the two defendants as the gunman and Hart as the other perpetrator.

In addition to the confusion concerning identification of the defendants, Hart asserts that evidence concerning his apparel was conflicting. Both victims testified that the gunman wore a black coat. At the hospital, Rayford was wearing a black coat. There was a black coat in the front seat of the Buick, next to where Hart had been sitting, but there was no blood on it. Citing the lack of blood, Hart asserts that he could not have been wearing it during the robbery.

There was evidence, other than the identifications of the victims, connecting Hart to the role of gunman. Singh testified

that the gunman had on a cap, and a baseball cap was found in the Buick where Hart had been sitting. And Spikes stated that Hart had been wearing a baseball cap. Singh testified that the taller of the two perpetrators was the gunman, and Hart is taller than Rayford. Finally, the defendants were tested for gunshot residue. Rayford had none. Hart had gunshot residue on his left hand.

B. *Analysis*

When we determine the sufficiency of the evidence to support a conviction or a finding by the jury, we "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "Purported weaknesses in identification testimony are to be evaluated by the jury [citation] and the testimony of a single eyewitness, if not inherently incredible, is sufficient to support a verdict. [Citation.]" (*People v. Keltie* (1983) 148 Cal.App.3d 773, 781-782.)

Focusing on the eyewitness identification of the victims, Hart contends that there is no solid, credible evidence that he was the gunman. To the contrary, there was ample evidence that he was the gunman. Although the eyewitness identifications conflicted, Singh consistently identified Hart in person as the gunman. Singh also noted that the taller of the perpetrators,

who was Hart, was the gunman. In addition to this eyewitness evidence, there was evidence that the gunman's clothing was in the area where Hart was sitting in the Buick, even if it did not have blood on it. And Hart had gunshot residue on his left hand, which was inculpatory even though there was evidence that Hart is right-handed.

All of the evidence concerning the various identifications made by Singh and Kaur was presented to the jury, and the jury concluded that Hart was the gunman. Furthermore, the evidence, even without the eyewitness identifications, was sufficient for the jury to reach the same conclusion. Therefore, even if the jury concluded that the eyewitness testimony was unhelpful, it could conclude that Hart was the gunman.

On this record, Hart's contention that the evidence was insufficient for the jury to conclude that he was the gunman is without merit.

III

Sufficiency of Premeditation Evidence

Hart contends that the finding on count 3 that the attempted murder of Singh was committed with premeditation and deliberation is not supported by sufficient evidence. Rayford joins this contention.³ The contention is without merit.

³ Although we conclude that we must reverse Rayford's conviction with respect to the premeditation and deliberation element of attempted premeditated murder, we must still consider this contention as to him because, if there was insufficient evidence that Hart committed attempted premeditated murder, then

“‘[P]remeditated’ means ‘considered beforehand,’ and ‘deliberate’ means ‘formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.’ [Citations.] The process of premeditation and deliberation does not require any extended period of time. ‘The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly’ [Citations.]” (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.)

Hart argues that his shooting of Singh was nothing more than a panicked reaction to seeing the gun in the drawer that Singh had opened. He reasons: “Singh testified clearly that the assailant shot when he saw the gun in the cash drawer. Further, the evidence was that Singh grabbed the money in the drawer and actually had it in his hand when he was shot. Singh’s reaching for money in the same drawer that held the gun must have appeared as if he was reaching for the firearm instead, thereby triggering undeliberated panic.” (Citations omitted.)

This may be a reasonable interpretation of the evidence, but it is not the only reasonable interpretation. It is also reasonable to conclude from this evidence (1) that Hart had decided, in advance, to kill the victim to eliminate a witness

Rayford cannot be retried for that crime. (See *People v. Caesar* (2008) 167 Cal.App.4th 1050, 1059.)

as soon as Hart had access to the money or (2) that Hart had decided, in advance, to kill Singh if there was any sign that Singh might resist. Both of these scenarios support a finding of premeditation and deliberation, instead of undeliberated panic. On appeal, we draw every reasonable inference in favor of the verdict. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.)

However, Hart contends that there was no evidence of planning of or motive for the attempted killing, citing *People v. Anderson* (1968) 70 Cal.2d 15, at pages 26 and 27. In *People v. Anderson*, the court stated that, in assessing the sufficiency of the evidence of premeditation and deliberation, it is appropriate to look at evidence of planning, motive, and manner of killing. (*Ibid.*) (Hart does not dispute that the manner of the attempted murder supports a finding of premeditation and deliberation.)

The record does not support Hart's contention that there was no evidence of planning or motive. As we noted, the fact that he shot Singh as soon as he saw the money and the gun supports the inference that he planned to kill Singh as soon as he had access to the money or Singh resisted in any way. And it is also reasonable to infer that Hart's motive was to kill Singh so that Hart could get the money or to eliminate any resistance. (See *People v. Brito* (1991) 232 Cal.App.3d 316, 323 [premeditation includes decision to shoot victim if victim not compliant].)

In his reply brief, Hart admits that he planned the robbery, but he asserts that "there are no facts beyond that which establish he premeditated the shooting." To the contrary, Hart carried the gun to the robbery, he drew it and pointed it at Singh, using the threat of being shot to motivate Singh to give up money, and he pulled the trigger, even as Singh was not resisting. Those facts support an inference of premeditation.

Hart also argues that we cannot conclude that he committed the attempted murder with premeditation because, instead of staying in the store to violently confront Singh for the money, he fled. Our analysis of premeditation, however, is not concerned with what defendant decides to do once the attempted murder has already been committed. That was an argument for the jury, not for the appellate court.

The record is sufficient to support the jury's verdict that the attempted murder of Singh involved premeditation and deliberation.

IV

Stay of Terms Imposed (Hart)

Hart asserts that, because the trial court imposed terms of 25 years to life on counts 1 and 2 for the discharge of a firearm resulting in great bodily injury (Pen. Code, § 12022.53, subd. (d)), the court was required to strike the firearm and great bodily injury enhancements associated with counts 5 and 6 instead of imposing and staying them.

This issue, as it relates to firearm enhancements, was decided adversely to Hart by the California Supreme Court the

same day Hart filed his opening brief. (*People v. Gonzalez* (2008) 43 Cal.4th 1118.) When multiple enhancements are found true for the use of a firearm, the trial court, after imposing the enhancement with the greatest prison term, must then impose and stay the remaining terms. (*Id.* at pp. 1122-1123, 1130.)

Logic dictates that the same is true as to the great bodily injury enhancement. Since the Penal Code section 12022.53, subdivision (d) enhancements were imposed as a result of great bodily injury inflicted on the victims, any other great bodily injury enhancement must be imposed and stayed.

V

Penal Code Section 654 (Rayford)

In a supplemental brief, Rayford contends the court erred in imposing consecutive sentences for the attempted robbery (count 1) and attempted murder (count 3) of Singh because the crimes were part of an indivisible course of conduct. Although we reverse the premeditation and deliberation finding on the attempted murder count as to Rayford, we consider this contention because the issue may arise on remand. We conclude that the trial court did not err because the facts supported a conclusion that shooting Singh was a gratuitous act of violence.

Under Penal Code section 654, a defendant may not be punished twice for a single act or an indivisible course of conduct. (*Neal v. State of California* (1960) 55 Cal.2d 11, 18-19.) If a defendant "entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed

in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.” (*People v. Beamon* (1973) 8 Cal.3d 625, 639.) We review a challenge under Penal Code section 654 for substantial evidence to support the trial court’s determination. (*People v. Osband* (1996) 13 Cal.4th 622, 730.)

California courts have repeatedly held that gratuitous violence against a helpless, unresisting victim is not incidental to robbery for purposes of Penal Code section 654. (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 190-191 [collecting cases]; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 272 [gratuitous beating of elderly, nonresisting robbery victim was not carried out with same objective as the robbery].) “[A]t some point the means to achieve an objective may become so extreme they can no longer be termed ‘incidental’ and must be considered to express a different and a more sinister goal than mere successful commission of the original crime.” (*People v. Nguyen, supra*, at p. 191.)

Rayford claims that he and Hart “had a single criminal objective, to rob Singh and Kaur, and that the attempted murder occurred as a result of Hart’s perception that Singh was about to shoot him. Accordingly, the attempted murder was committed in an effort to escape, and was thus indivisible from the single purpose of accomplishing a robbery.” (Citations omitted.)

This is only one possible interpretation of the evidence. As noted, we review the trial court’s sentencing decision under the substantial evidence standard. Viewed in the light most

favorable to the trial court's sentencing decision, the evidence adduced at trial supports a conclusion that Singh was not resisting. He went to the cash register and opened the drawer with the money in it. Although there was a gun in the drawer, Singh was reaching for the money. Even though Singh was not resisting, Hart shot at him multiple times, hitting him in the abdomen once.

Viewed in this light, the evidence was sufficient to support the trial court's implicit finding that attempted robbery and attempted murder were not part of an indivisible course of conduct because shooting Singh was a gratuitous act of violence. The trial court did not err in imposing consecutive sentences.

DISPOSITION

The finding that Rayford premeditated and deliberated with respect to the attempted murder is reversed. If, after the filing of the remittitur in the trial court, the People do not bring Rayford to retrial on the premeditation and deliberation element within the statutory time limits, the trial court shall proceed as if the remittitur constituted a modification of the judgment to reflect a conviction of attempted unpremeditated murder and shall resentence Rayford accordingly. In all other respects, the judgment as to each defendant is affirmed.

We concur: _____, Acting P. J.

_____ HULL, J.

_____ BUTZ, J.